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No. 95-942

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DEBORAH GORE DEAN,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent,

On Petition For a Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

Petitioner, Deborah Gore Dean, respectfully submits this reply brief in further support of her petition for writ of certiorari and in reply to the brief in opposition.

I. INDEPENDENT COUNSEL'S ATTEMPT TO SALVAGE COUNTS I, II, AND III FROM REVERSAL PURSUANT TO *YATES* IS WITHOUT MERIT.

The issue before this Court is whether multiple-object conspiracy counts, I, II and III must be reversed because one of the objects in each count is not a crime, a general verdict was returned and it is impossible to tell which object the jury selected. *Yates v. United States*, 354 U.S. 298 (1957).

Respondent argues that *Yates* is inapposite because the § 1001 object *was* a crime (that remained unaffected by *Hubbard*) because it encompassed "actions Dean took as a Department official" which was conduct within the jurisdiction of an executive agency -- the Department of Housing and Urban Development. ("HUD") Op. Cert. at 5. As set forth below, this argument ignores the plain language of the Indictment and the jury instructions, and is unsupported.

A. The Plain Language of the Indictment Establishes That The § 1001 Object Relates to Matters Within The Jurisdiction of the Senate Banking Committee.

The "scope" of the § 1001 object is established by the plain language of the Indictment.[1] Because the § 1001 object does not specify "the jurisdiction of a department and agency

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[1] To hold otherwise suggests that courts have the discretion to enlarge the scope of an indictment to, in effect, create additional crimes.

of the United States" to which it relates,[2] this Court must look to the specifically delineated "overt acts."

There is only one identical overt act in each conspiracy count which could conceivably support the § 1001 object and that act identifies only the Senate Banking Committee. Pet. at 8. Moreover, that overt act mirrors the allegations of the substantive § 1001 counts (Counts VI, VIII, X and XII) on which the jury convicted. Pet. at 8-11. There are *no* overt acts that support Respondent's contention that the § 1001 object was "within the jurisdiction of HUD" and he does not cite to one.

B. The Jury Was Instructed That The § 1001 Object Relates to Matters Within The Jurisdiction of the Senate Banking Committee.

When the district court instructed the jury on the elements of conspiracy, it instructed them separately on the various objects in each count. When the court reached the § 1001 object, however, it stated:

> Later in these instructions, I will define the elements of the offense of falsifying and concealing material

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[2] Counts I, II, and III each allege a violation of 18 U.S.C. § 1001 as one of its objects by tracking the language of the statute: ". . . defendant DEBORAH GORE DEAN, in matters *within the jurisdiction of a department and agency of the United States*, would knowingly and willfully falsify, conceal, and cover up . . . in violation of Title 18, United States Code, Section 1001." Indictment, Count I, A-28-29, ¶1(C); Count II, A-42, ¶1(C). *See also* Count III, A-56, ¶1(C) (ii).

Contrary to Respondent (Op. Cert. at 4, n.2), the *Yates* analysis applies to Count III. The affirmance of the substantive § 201 count may satisfy a *Griffin v. United States*, 502 U.S. 46 (1991) analysis but it is irrelevant to a *Yates* analysis.

> facts within the jurisdiction of a department or agency of the United States which, if proved beyond a reasonable doubt, constitutes a separate substantive crime . . . . I instruct you now that the elements of these offenses have the same meaning in this count (the conspiracy counts) as they do in the later counts.

A-181 (emphasis added).[3] When the court did later discuss the concealment counts it stated:

> And as to the final element, the fourth element, you are instructed the material facts charged in Counts 6, 8, 10, 12 are matters within the jurisdiction of the Senate Banking Committee and are thus matters within the jurisdiction of a department or agency within the United States.

A-185 (emphasis added), *see also* A-182-84. Moreover, the jury was given a copy of the Indictment and the instructions so that it could compare the objects alleged in the conspiracy counts and the instructions on those counts to the instructions on Counts VI, VIII, X and XII. A-186. The government did not object to the instructions or to the fact that they were provided to the jury.

C. The Prosecutor Confirmed In Closing Argument That All Concealments Related to the Senate Banking Committee.

The prosecutor argued in closing argument that the only concealment alleged was contained in Counts V through XII (the perjury and concealment substantive counts), thus acknowledging that the concealment alleged in the conspiracy

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[3] References to the Appendix to the Petition are identified as A-1 through A-160. References to the Appendix to this booklet begin at A-161. References to Respondent's Appendix are "RA-__."

counts (the § 1001 object) was the same as that alleged in the substantive counts. *See* A-81-82, 112-13, 142-43.

D. Independent Counsel's Assertion That The § 1001 Object Was Within HUD's Jurisdiction Is Without Merit.

Despite the foregoing, Respondent points to out-of-context excerpts from the court's opinion and the Indictment in an attempt to suggest that it was concealments made to HUD (not to the Senate) that are the basis of the § 1001 object. These arguments are without merit.

First, Respondent relies on footnotes 9 and 10 to suggest that the court found that the § 1001 object relates to concealments to HUD. These footnotes were in the context of a *Griffin*, as opposed to a *Yates*, analysis as Petitioner had appealed on the basis of insufficient evidence as to all twelve counts. A-2. Petitioner did not argue for reversal of the multiple-object conspiracy counts on the basis of *Yates*, as *Hubbard* was decided only after oral argument. Indeed, *Yates* was not discussed in the opinion.

Second, Respondent argues that the court's use of the term "other" (A-11) somehow "distinguish[es] the scope of the conduct included within the § 1001 object of the conspiracy counts from the § 1001 substantive counts." Op. Cert. at 6-7. This is frivolous. The language is merely used as a transition into a discussion of the remaining counts. The court could easily have used the term "last" or "next" without any change in the meaning of the sentence.

Finally, Counsel suggests that because the last paragraph of the manner and means (discussing concealment) is "60 paragraphs" prior to the overt act alleging concealments to the Senate Banking Committee, that a concealment other than to that Committee was alleged. Op. Cert. at 7-8.

The mere lack of proximity of the paragraphs speaks not to the agency alleged, but instead only to the length of the conspiracy charged. Additionally, the overt act dealing with the Senate Banking Committee had to be placed *after* the other overt acts in the conspiracy counts since the concealment related back to all the projects charged in that count (the previous overt acts) and chronologically occurred thereafter.

II. THE CUMULATIVE EFFECT OF THE PROSECUTOR'S MISCONDUCT DENIED PETITIONER HER CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

A prosecutor's conduct at trial must be fair and must not deprive a defendant of her right to due process and a fair trial. This case presents pronounced prosecutorial misconduct that persisted throughout the trial and culminated in an inflammatory closing argument. Pet. at 14-28. It presents the vehicle for this Court to define the proper latitude given a prosecutor during trial and closing argument.

A. The Prosecutor Expressed His Personal Opinion That The Petitioner Had Lied.

Petitioner does not contest that a prosecutor may comment that a defendant did not tell the truth when perjury is charged. Such comments, however, may not be excessive, must be tied to the perjury count, and must not effect the fairness of the trial. *United States v. Young*, 470 U.S. 1, 18-19 (1985). Here, the prosecutor stated at least thirty-one times[4] in closing argument (and eighteen times in rebuttal)

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[4] This number does not include the fifteen or more times the prosecutor used the words "lied," "lies," or "lying," when accusing Dean of falsely accusing other persons of lying or fabricating receipts. *See* A-108-109, 124-125.

that Petitioner had lied, an amount more excessive than any reported case located by Petitioner.[5] In addition, the prosecutor did not tie his statements to the perjury counts (Petitioner's testimony before Congress).[6] Many of the most inflammatory statements were broad assertions that were not directed at any particular piece of evidence. *See* Pet. at 14-19; A-80-144. The inflammatory statements were aimed at Petitioner's testimony at trial and crafted to "vouch" for the government witnesses.

The district court's "curative" instruction served to solidify in the juror's minds that it *was* the prosecutor's personal opinion that the Petitioner had lied and to exacerbate the effect of the prejudicial conduct. Pet. at 20-21.[7]

B. The Prosecutor's Use Of Perjured Testimony and False Evidence During the Trial Demonstrated A Reckless Disregard for the Truth.

Thomas T. Demery. Contrary to Respondent's assertions (Op. Cert. at 13), the fact that Demery committed perjury during the trial (with respect to whether he previously lied to Congress) is clear and unambiguous. A-

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[5] The cases cited by Independent Counsel are no exception. Op. Cert. at 11, *citing Young*, 470 U.S. at 19-20 (prosecutor's statement of his belief that respondent intended to commit a fraud, and statements regarding "honor and integrity", did not "undermine the fairness of the trial and contribute to a miscarriage of justice"); *Darden v. Wainwright*, 477 U.S. 168, 179 (1986) (Government's argument and use of the word "animal" did not "so (infect) the trial with unfairness as to make the resulting conviction a denial of due process").

[6] The trial court recognized that the prosecutor's statements were unrelated to the perjury counts. Pet. at 18 n.8.

[7] The other instructions Respondent referred to as "curative" (Op. Cert. at 12) are merely standard jury instructions.

165-66. Respondent cannot dispute that the prosecutor knew that Demery committed perjury when he testified at trial that he had not lied to Congress.[8]

Demery's testimony that Petitioner pressed the Dade County funding was a critical element in the government's case in support of Count III and the Kitchen gratuity count (Count IV).[9] The testimony was used to contradict Petitioner's testimony that it was Demery who brought the Dade County funding request to her attention (and she then wrote down *his* request),[10] that she consulted with Pierce about a conflict concerning Kitchen and that she was silent at the selection committee meeting when the project was discussed. A-169-78.[11] Certainly the jury would have been inclined to disbelieve Demery's testimony had it known that he twice lied to Congress while under oath.

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[8] The government charged Demery with two counts of perjury. Demery negotiated a plea agreement that did not include a perjury. The government agreed to this because a plea that included perjury could greatly damage Demery's credibility when he was called as a witness at Petitioner's trial. After his plea, Demery admitted he lied to Congress on two occasions -- Petitioner did not know that fact. Pet. at 22.

[9] Indicative of the importance the government placed on this testimony is the fact that the prosecutor chose to end with this evidence (last question of case-in-chief). A-167-68.

[10] The court of appeals stated that "Dean's handwritten note recorded precisely the number of units . . . and suggests that she and Kitchen conspired . . . " A-29-30.

[11] Former HUD general counsel, J. Michael Dorsey confirmed that it had been Demery who pushed the Dade County funding at the selection committee meeting and that he (Dorsey) did not remember Petitioner speaking about it. A-179-80.

Ronald L. Reynolds. Respondent downplays the significance of the Reynolds testimony[12] in an attempt to divert this Court's attention from the fact that the prosecutor knew that Reynolds would not be a truthful witness prior to putting him on the stand. See Pet. at 23. However, Reynolds testimony was very significant and certainly may have contributed to the verdict. Reynolds was called as a rebuttal witness to show that Petitioner had lied about her relationship to Mitchell. If this testimony was not significant, as Respondent contends, the prosecutor would not have relied on it so heavily in closing argument to attack Petitioner's credibility. *Id.*

The Sankin Receipts. Respondent failed to question Sankin before trial and about which receipts, if any, pertained to Petitioner before their introduction into evidence. Once the receipts were admitted into evidence, the burden inappropriately shifted to Petitioner to establish that they did not relate to her. Her efforts to do this then resulted in the prosecutor's ridicule in closing argument that she had falsely accused others of lying. A-108-09

Respondent does not deny that the prosecutor knew that some of the receipts did not pertain to the Petitioner and despite this knowledge, failed to inform the court[13] or defense counsel of these facts, relied on all of the receipts including the ones that Sankin specifically disavowed on cross examination -- 11q (A-163-64), 11v (A-161-62), and relied on all of the receipts in closing argument. Pet. at 24; Op. Cert. at 14.

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[12] Op. Cert. at 15.

[13] The district court acknowledged this misconduct. Pet. at 24, A-150-153.

Respondent's attempt to discount the significance of the prosecutor's misconduct ("virtually all the (12) receipts referenced Petitioner by name or by her HUD title") is without support. Op. Cert. at 14.[14] The court held that "*on the basis of Sankin's credit card receipts*, the jury could have concluded that . . . Sankin entertained Dean and discussed moderate rehabilitation funding or other Department matters with her on eight occasions." RA-20.

Witness Vouching. Respondent's statement that the prosecutor's assertion in closing argument that the Petitioner was "the only one we know who definitively did lie" is supported by evidence in the record is disingenuous. As discussed *supra*, the prosecutor was aware that Demery and Reynolds did not testify truthfully. Furthermore, there was no evidence whatsoever that Petitioner ever misled Secretary Pierce about "projects in which she had an interest." Op. Cert. at 16.[15]

Inciting Racial Prejudice. Respondent argues that the racially motivated comments identified by Petitioner were "taken out of context and misinterpreted," but does not indicate how or why. The argument also blatantly disregards

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[14] Contrary to Respondent's assertion, four of the twelve receipts listed (Op. Cert. at 14) did not reference Petitioner or her title, but referred to a "staff assistant" (11n, 11o) or to a "HUD Asst to Sec." (11q) -- titles consistent with Sankin's girlfriend's position at HUD; or "Asst. Sec. of HUD" (11v) -- a title consistent with the position Silvio DeBartolemous had held. Of the eight remaining receipts, only one (11k) was consistent with the Petitioner's calendar.

[15] For lack of any supporting evidence, Respondent states: "There is evidence in the record from which a reasonable factfinder could conclude that petitioner misled the Secretary. For example, petitioner herself stated that Secretary Pierce was a fine man and a prominent attorney. One could reasonably infer from such evidence that Secretary Pierce would not have allowed his Executive Assistant to participate in decisions regarding projects in which she had an interest." *Id.*

the fact that the district court repeatedly chastised the prosecutor for making remarks while the defendant was on the stand in circumstances that *the court perceived as intended to incite racial hostility*. Pet. at 26-28.

* * *

Respondent suggests that the prosecutor's misconduct was isolated or unimportant and that it should therefore be disregarded. The prosecutor's closing argument, however, demonstrates just the opposite.[16] Here, the prosecutor repeatedly and virulently accused the Petitioner of lying and relied on perjured testimony (Demery and Reynolds) and false evidence (Sankin receipts). The prosecutor's actions forced Petitioner to deny what the prosecutor knew or had reason to know was false and to suffer his ridicule when he argued that her denial was a lie. The prosecutor's misconduct also had the effect of pitting the Petitioner against a number of witnesses so that the prosecutor could utilize the argument that "all of *these* people cannot be lying -- the defendant is."

The prosecutor's actions demonstrate the importance of this evidence to his case and his reckless disregard for the truth. His actions were intentional and were calculated to cause the jury to reach conclusions based on improper inferences, evidence and considerations. The cumulative effect of this misconduct violated Petitioner's constitutional right to due process and a fair trial.

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[16] It is well established that even if individual acts of prosecutorial misconduct do not rise to the level of reversible error, the cumulative effect can be so prejudicial that reversal is required. *See* Petition at 14, n.6 and authority cited therein.

Respectfully submitted,

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APPENDIX

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TRANSCRIPT

[Transcript 1217-1218]

[Tr. 1217]

* * *

BY MR. WEHNER:

Q Do you recall when Kelly Joyce graduated?

A No.

Q Do you recall that Kelly Joyce graduated on May 16 of 1987?

A No, although I must tell you I don't think that Deborah Dean was present there.

Q Do you recall taking Kelly Joyce to dinner the night of her graduation?

A No.

Q Are you aware that on that date Miss Dean was with your lawyer's partner, Plato Cacheris, with her aunt at a horse race?

A Why would I be aware?

Q Because you wrote on the list who receipt she was having dinner with you.

A Are you referring to this receipt?

[Tr. 1218]

Q Read it, please?

A It says dinner with Assistant Secretary of HUD. I don't believe that refers to Deborah Dean, as I just told you.

Q Who does that refer to?

A I think it more than likely refers to Silvio DeBartolomeis.

Q Was Kelly Joyce with you at that dinner?

A Sir, I don't remember.

* * *

[Transcript 1222-1223]

[Tr. 1222]

* * *

Q Now, I believe before the break you testified that -- you were talking about a receipt from the Georgetown Leather design. Isn't it true you never gave Deborah Gore Dean a gift from Georgetown Leather Design?

A Sir, I don't remember.

Q Isn't it true you gave it to Carter Bell?

A Sir, I don't remember.

Q And isn't it true that that's the reason you wrote it off because you felt it was somehow related to HUD?

A May I see the Exhibit, please?

MR. WEHNER: Sure.

THE COURT: It's Exhibit 11Q, I believe.

MR. WEHNER: Your organizational skills are far superior to mine, Judge. Just give me a second.

THE COURT: Is 11Q out there?

MR. WEHNER: Here it is.

A I can only say that I see nothing on here that would indicate I gave this to Deborah Dean.

[Tr. 1223]

Q Now, the question is did you give it to Deborah Dean?

A My answer is I don't think so.

THE COURT: Let me see that exhibit? Thank you.

There is some writing in the exhibit, right?

THE WITNESS: Yes, sir.

THE COURT: And that's in a different color ink than on the rest of the exhibits. What does it say?

THE WITNESS: It says HUD Assistant to Secretary.

THE COURT: Business gift.

THE WITNESS: Yes, sir, it says business gift, HUD Assistant Secretary.

BY MR. WEHNER:

Q Who do you believe you gave that to, Mr. Sankin?

A I don't know.

Q You didn't give that to Miss Dean, isn't that correct?

A I don't think so because the notation is not consistent with something I would have written that I gave to Miss Dean.

* * *

[Transcript 1916-1917]

[Tr. 1916]

* * *

Q. And did you swear to tell the truth?

A. Yes, I did.

Q. And did you tell the truth?

A. Yes, I did.

Q. You told the utter and complete truth in front of those -- on those hearings?

A. Yes, I did.

Q. Okay. You haven't been -- you didn't plead guilty to perjury, did you?

A. No, I did not.

Q. Okay. Is that because you've never committed perjury?

A. Of course.

Q. Okay. And you told the truth in front of the Lantos committee in the same fashion as you're telling the truth today correct?

A. Correct.

Q. I mean, you've been put under oath today, correct?

A. Yes.

Q. And you had the same obligation you have today as when you were in front of the Lantos committee? You recognize that?

A. Yes, I do. I know a lot more than I did before the Lantos committee. I've had an opportunity to look at documents and spend a lot more time on issues than I did when I testified in front of Chairman Lantos.

[Tr. 1917]

Q. Okay. So you may have made some mistakes in front of the Lantos committee, but they certainly wouldn't have been intentional; is that what you're saying?

A. Yes.

* * *

[Transcript 1939-1940]

[Tr. 1939]

Mr. Demery, do you recall the specific allocation of 203 units to a project in Dade County, Florida in the spring of 1987?

A I recall 203 units being allocated to Dade County, yes.

Q Did you know who the developers were in that project?

A No.

Q Did you know who the consultant was on that project?

A No.

Q Did you push for that project?

A Excuse me, at the time Ms. Dean and I were reviewing the funding applications from the PEA. As I said, as a part of the process each would let the other know any contacts that were made. It's very possible at that time I was told, I just don't remember.

Q Did you have anything to do with the funding of that project?

A In an official capacity, yes.

Q How about in an unofficial capacity?

A Well, I presented it to the committee, but I was not the initial contact on behalf of the PHA.

Q Who was, if you know?

A It was brought to my attention by Miss Dean.

[Tr. 1940]

MR. O'NEILL: I have no further questions. Thank you.

* * *

[Transcript 2572-2580]

[Tr. 2572]

* * *

A. Well, I didn't have any discussions until it was time to do the next round, and Mr. Demery came up to my office and wanted to discuss the projects that he was bringing forth to the meeting, I believe it was the following day.

Q. Did that meeting take place?

A. Yes.

Q. Okay. And who was present during the meeting?

A. Mr. Demery and myself.

Q. Anyone else?

A. No.

Q. Okay.

A. I mean, in the pre-meeting.

Q. Yes.

A. Mr. Demery came to see me, and I believe he told me he was also going to see Mr. Dorsey. I don't remember. I don't understand why we were having the meeting.

Q. Okay.

A. He came up. He wanted to talk about it. And I said, "Okay."

Q. Directing your attention to the actual meeting when these funding decisions were made, did that meeting take place?

A. Yes.

Q. Okay. And who was present at that meeting?

A. Mr. Dorsey, Mr. Demery, and myself.

[Tr. 2573]

Q. And this was the day following the day Mr. Demery came up to see you?

A. That is correct.

Q. Okay.

A. Meanwhile, I'd had a meeting with Secretary Pierce.

Q. Did you reach an understanding with Mr. Demery during the pre-meeting as to which projects he wanted funded and why?

A. He didn't discuss every one. He went down the list, and I wrote the list out as he was reading it to me, and I guess he was trying to see if there was going to be any discussion during the meeting. I mean, I think he wanted to sort of basically grease the meeting before the meeting.

So I wrote them down very hurriedly on a piece of paper and asked him some questions. He gave me some information, and I took that information to the secretary, and I then attended the meeting, I believe it was the following day.

Q. Did you have a discussion with Secretary Pierce regarding what was on the list?

A. I had a discussion with him about -- I gave him the list, but there were four projects that I wanted to discuss with him before they were funded.

Q. And did you discuss those with him?

A. Yes, I did.

Q. Which four were they?

A. Prince George's County; the Dade County, Florida, for 203;

[Tr. 2574] there is one for Wisconsin for, no, not 8, Brown County, Wisconsin, for 75; and one was for the Michigan State Housing Development Authority, which eventually was not funded but was on the list that Mr. Demery gave me.

Q. Did you discuss those with Secretary Pierce?

A. Yes. Mr., Mr. Demery had -- I wrote down the list, and I know that it's a government exhibit that they, I believe they have the list, and when we got to the ones where I had a problem or I felt I needed to talk to Secretary Pierce, I put a square around them to remind myself which ones they were, and so I -- and I had problems with those four.

* * *

BY MR. WEHNER:

Q. Ms. Dean, is this the list to which you've been referring?

A. Yes.

Q. Now this list was written by you --

A. Yes.

Q. -- as a result of a meeting with Mr. Demery?

[Tr. 2575]

A. Yes. He was reading them to me. He had a piece of paper in his hand, and he had some PRA letters, and he was reading the list to me.

Q. And you testified that you put a square around those for what purpose?

A. To discuss them with Secretary Pierce in detail.

Q. Okay. Why did you put a square around "Metro Dade, 203 units"?

A. Because Mr. Demery told me that Lou Kitchen was supporting that particular application and --

Q. Did you relate that to Secretary Pierce?

A. Yes, I did. I was very concerned.

Q. Why?

A. Because I was in the process of decorating Mr. Kitchen's apartment, and I didn't think I ought to be making a decision on something that he was supporting.

Q. And did you reach an understanding with the secretary as to whether that project should be funded?

A. He said that I should not --

MR. O'NEILL: Objection, Your Honor.

THE COURT: All right, I'll sustain it.

BY MR. WEHNER:

Q. What was your understanding based on your conversation with the secretary?

MR. O'NEILL: Objection, Your Honor.

[Tr. 2576]

THE COURT: All right, I'll sustain it. I think you're going to have to approach it a different way.

BY MR. WEHNER:

Q. Did you reach an understanding with the secretary regarding the funding of the Metro Dade project?

A. Yes.

Q. What was that understanding?

A. My understanding was that I was not to say a word about it during the meeting, not to vote on it.

Q. Directing your attention to P.G. County, is that your square around "P.G. County"?

A. Yes.

Q. What was your concern about P.G. County?

A. Well, Mr. Rick Shelby had come to see me several weeks or a month or so before this project, and he had -- I had known that he was involved in projects before, but he had never actively asked me to help him, and he came and said, "I would like your help in getting these 88 units for Prince George's County."

And Mr. Shelby was a friend of mine, and I had never had someone who I knew personally ask me for something like that before, and I remember telling him that I couldn't, I couldn't do anything except take it to the secretary.

I had taken it to the secretary, and the secretary -- I mean, I told him, I said, "Someone who I consider to be a personal friend, not a HUD friend, has come to me and asked me to [Tr. 2577] help him, and I felt very awkward about it."

He asked me who Mr. Shelby was, and I went through a long history of Mr. Shelby and who he was and everything else, and he said, "Well, if the project makes it --"

MR. O'NEILL: Objection, Judge. And I'm just put in the same position of objecting to everything.

THE COURT: I understand. Let's just go ahead with your own testimony, not what other people said to you.

THE WITNESS: I'm sorry. I'm sorry.

I said to the secretary that I was uneasy about it, and I was, I didn't do anything else about it. I didn't put it -- I didn't send it downstairs, I didn't do anything with it.

It came up from Mr. Demery, and I felt I had to raise it again with Secretary Pierce.

That and the fact that it was also in Prince George's County, which was in my home state of Maryland, and I always made it a matter of policy to discuss with Secretary Pierce anytime anything happened that was of a discretionary nature in Maryland, because I didn't feel that it ought to look like I was doing anything for my own home state, which was the same reason that I squared "MSHDA," because Michigan State Housing was Mr. Demery's home state, and I thought that Secretary Pierce ought to be aware that Mr. Demery was going to fund his own home state.

And I was given a different instruction on Prince George's County, and I was -- and my impression of what was said **[Tr. 2578]** to me was that just because I knew someone who was working on a project, I couldn't not consider the project, and that as far as the secretary was concerned, 88 units going to Prince George's County was perfectly fine, legitimate. I had brought my concern to him, he understood it, he didn't think there was anything wrong with it, and I should proceed with having that one on the list.

BY MR. WEHNER:

Q. You also squared "Wisconsin"?

A. Yeah. Michigan was the same thing. He felt that -- I'm sorry, my impression was that it was all right to leave Michigan on the list, that Mr. Demery couldn't just never send money to Michigan, because he was from Michigan, that my concerns about --his were a little more than Secretary Pierce thought were necessary.

And "Wisconsin" I squared because Mr. Demery told me that he had gotten a phone call from Senator

Proxmire, that Senator Proxmire had talked about it directly, and Senator Proxmire and Secretary Pierce were not on the best of terms, and I felt this was something that the secretary needed to know, that Mr. Demery was communicating with Mr. Proxmire personally and that also he was going to fund a project for Secretary Proxmire.

So those were the four that I squared.

Q. You relayed all this information to the secretary?

A. Yes, I did.

[Tr. 2579]

Q. You received instruction from the secretary as to how to proceed?

A. How I was to proceed in that meeting, yes.

Q. And did you follow those instructions?

A. To the letter.

Q. Now was there a subsequent meeting between you, Mr. Dorsey, and Mr. Demery?

A. Yes.

Q. Did you attend and participate in the meeting?

A. Yes, I did.

Q. Do you recall whether Mr. Dorsey raised questions regarding Metro Dade?

A. Yes. We had funded, as I said, in the earlier round 412 units for Metro Dade, and now there was another 350 on the, the next funding round, and Mr. Dorsey asked Mr. Demery if we weren't sending too many units to Metro Dade, and Mr. Demery said that no, he felt Metro Dade was in serious need of housing, which it is, and that there was nothing unusual about this number of units going down to that area. Mr. Dorsey said, "Fine."

Mr. Demery attempted to engage me in conversation about Dade County, Florida, and I said, "Unh-unh. I'm not talking." And I said, I said, "I have a reason not to vote on this."

Q. Did Mr. Demery and Mr. Dorsey agree to fund the projects, the four that you had mentioned to Secretary Pierce?

A. Yes. And there was a lively discussion on Houston as well, **[Tr. 2580]** 205 in Houston. Mr. Demery voted against that; Mr. Dorsey and voted for it. The, both, both Metro Dades were Mr. Dorsey and Mr. Demery, with my abstaining, although I didn't say I was abstaining. I just didn't say anything.

Prince George's County, I believe that there was actually some mention of Mr. Shelby during that, and I told everyone that I had spoken to the secretary about it and that it was up to them to vote for it, but that I had, I had at least said my piece about it to Secretary Pierce, that I thought he felt okay to go ahead and move on with that one.

And there was no discussion about Wisconsin, because didn't bother Secretary Pierce it was on the list, so there was no discussion about it. And there was some discussion about Sackets Harbor, New York, and Spring Valley, New York, because they were -- and maybe the

Puerto Rico ones as well. I think those were requests from Senator D'Amato. And I don't remember anything else about the rest of them.

* * *

[Transcript 3176-3177]

[Tr. 3176]

* * *

Q Directing your attention to the date of the early spring, or spring of 1987, do you recall being involved in the selection process for Moderate Rehabilitation units?

A Yes.

Q Do you recall sitting in a discussion with Mr. Tom Demery and Miss Deborah Gore Dean regarding Moderate Rehabilitation funding?

A Yes.

Q Directing your attention to that meeting, do you recall any discussion regarding a funding of 200 units to Metro-Dade Florida?

A I recall that there was an allocation of units to Metro-Dade and I asked Mr. Demery why we were funding Metro-Dade because as Assistant Secretary for Public Housing I was aware that there was a grand jury investigation of Metro-Dade Housing Authority and also that the Executive Director of this Housing Authority had been fired. Mr. Demery's response was that he had looked into this. He was aware of the problems that Metro-Dade had had, but he was also aware that they had an ability to do development or do development units and also that they had a great need because of refugees coming from Cuba and other parts of Latin America.

[Tr. 3177]

Q Do you recall Miss Dean saying anything about that allocation of units?

A I don't have any recollection of her saying anything, no.

* * *

[Transcript 3553]
(emphasis added)

* * *

Counts 1 through 3 charge that the defendant, Deborah Gore Dean, conspired to commit a substantive offense against the United States by agreeing to falsify and conceal material facts within the jurisdiction of a department or agency of the United States by means of trickery and deceit so as to conceal the manner in which the, in which HUD funding decisions were actually made. Additionally, Count 3 alleges the defendant agreed to demand, seek, or receive an illegal gratuity of $4,000 for and because of official acts performed and to be performed by her.

Later in these instructions, I will define the elements of the offense of falsifying and concealing material facts in a manner within the jurisdiction of a department or agency of the United States which, if proved beyond a reasonable doubt, constitutes a separate substantive crime. I will also define the elements of the offense of acceptance of an illegal public payment by a public official. I instruct you now that the elements of these offenses have the same meaning in this count as they do in the later counts.

* * *

[Transcript 3570-3575]
(emphasis added)

[Tr. 3570]

Now, Ladies and Gentlemen, we have a few more pages of instructions. I will give you the instructions on Counts 6, 8, **[Tr. 3571]** 10, 12, which is falsifying or concealing by trick or device, and then the final instructions on deliberations that govern your deliberations.

First, as to Counts 6, 8, 10, and 12, they charge the defendant, Deborah Gore Dean, knowingly and willfully falsified, concealed, or covered up by a trick, scheme, or device certain material facts that she had a duty to disclose concerning matters within the jurisdiction of the Senate Banking Committee, in violation of Title 18, United States Code, Section 1001.

Count 6 charges that on or about August 6, 1987, in connection with her testimony under oath before the Senate Banking Committee, defendant Deborah Gore Dean knowingly and willfully falsified, concealed, or covered up material facts that she had a duty to disclose concerning the manner in which HUD's mod rehab funding decisions were actually made and her role in those funding decisions; specifically, by testifying that HUD field offices rated and ranked mod rehab applications from public housing authorities and that a panel of HUD officials, of which the defendant, Deborah Gore Dean, was a member, would make mod rehab funding decisions based solely on information provided to the panel by HUD's assistant secretary of Housing.

Likewise, Count 8 charges that on or about August 6, 1987, Deborah Gore Dean knowingly and willfully falsified, concealed, or covered up material facts that she had a duty

to disclose by testifying before the Senate Banking Committee, that **[Tr. 3572]** she had never given or approved or pushed or coerced anyone to help any developer, and when she asserted that developers' meetings with HUD officials were a tremendous waste of time.

Count 10 charges on or about August 6, 1987, in connection with her testimony under oath, before the Senate Banking Committee, defendant Deborah Gore Dean knowingly and willfully falsified, concealed, or covered up material facts that she had a duty to disclose by willfully failing to disclose her knowledge of the HUD project known as Baltimore Uplift One.

And finally, Count 12 charges on or about August 6, 1987, defendant Deborah Gore Dean knowingly and willfully falsified, concealed, or covered up material facts from the Senate Banking Committee when she testified under oath before the Senate Banking Committee concerning her lack of knowledge of the award of mod rehab units to projects in the State of Maryland.

Now, Ladies and Gentlemen, as to the statute under which these charges arise, Section 1001 of Title 18 of the United States Code provides in relevant part that: Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact . . . shall be guilty of an offense against the United States.

Elements of the offense. In order to establish that defendant Deborah Gore Dean is guilty of knowingly and willfully falsifying or concealing by trick or scheme a material fact that **[Tr. 3573]** she had a duty to disclose, as charged in Counts 6, 8, 10, and 12 of the indictment, the

government must prove each of the following elements beyond a reasonable doubt:

First, the defendant falsified or concealed or covered up a material fact;

Second, that she did so by trick, scheme, or device;

Third, that she acted knowingly and wilfully; and

Fourth, that the falsification, concealment or cover-up was with respect to a matter within the jurisdiction of a department or agency of the United States.

The first element that the government must prove beyond a reasonable doubt is the defendant, Deborah Gore Dean, falsified, concealed, or covered up a material fact. The Court has already determined that the government has established that the facts at issue in each of the Counts 6, 8, 10, and 12 were material. Therefore, you should not be concerned with this aspect of the first element of the offense.

The second element of the offense the government must prove beyond a reasonable doubt is that the defendant, Deborah Gore Dean, falsified or concealed or covered up by trick, scheme, or device. A scheme is a plan for the accomplishment of an objective. A trick or device is a deceptive act or strategy calculated to deceive persons.

To falsify means to make a statement that is untrue at the time it is made and that the person making the statement [Tr. 3574] knows to be untrue at the time it is made. To conceal means to withhold from another. It requires some act to prevent detection of some fact the defendant was required to reveal. To cover up means to hide from another.

Whether the defendant Deborah Gore Dean's behavior amounted to a trick, a scheme, or a device is a question for you as finders of the facts to decide. It is the government's burden with respect to this element to prove beyond a reasonable doubt that the defendant falsified or concealed or covered up a material fact by trick, scheme, or device.

The third element. If you decide the defendant, Deborah Gore Dean, did, in fact, falsify or cover up a material fact by trick, scheme, or device, as charged in each of Counts 6, 8, 10, and 12 of the indictment, you must then decide whether she acted knowingly and willfully.

An act is done knowingly if it is done purposely and voluntarily, as opposed to mistakenly or accidentally.

An act is done willfully if it's done with an intention to do something the law forbids, a bad purpose to disobey the law, or with specific intent to fail to do something the law requires to be done.

And as to the final element, the fourth element, you are instructed the material facts charged in Counts 6, 8, 10, and 12 are matters within the jurisdiction of the Senate Banking Committee and are thus matters within the jurisdiction of a **[Tr. 3575]** department or agency within the United States.

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[Transcript 3577]

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Now, Ladies and Gentlemen, I'm going to provide you, I am providing you with a copy of the instructions. During your deliberations, you may if you want to refer to these instructions. While you may refer to any particular portion of the instructions, you are to consider the instructions as a whole, and you may not follow some and ignore others. The fact that you have been provided a copy of my instructions should not discourage you from making an inquiry regarding the meaning of these instructions if necessary.

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